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'Enemies of the People'? The Judiciary and Claude Lefort's 'Savage Democracy'

Panu Minkkinen

Democratic 'enemies'?

Thomas Stockmann, the protagonist of Henrik Ibsen's play *An Enemy of the People* (1882), is an educated and civilised physician who is, among other things, responsible for monitoring the health standards at the baths of his home town on the Norwegian coast. Stockmann suspects that the thermal waters are contaminated. When tests verify his suspicions, he announces his intention to disclose the facts to the public. He is subsequently confronted by his brother Peter, the Mayor, who insists that revealing the poor quality of the waters would do no good and would, in fact, be detrimental to the livelihood of the town. As an inflexible man of principle, Stockmann is, however, adamant that the truth must prevail at all costs.

A town meeting is called together. As he realises that the publication of his results are being managed and manipulated by the local press, by his brother the Mayor, as well as by other municipal authorities, Stockmann becomes ever more agitated about the narrow-mindedness of not only those who are trying to prevent him from disclosing the facts, but also of the general public that does not seem to share his own appetite for the truth. The public, so it seems to Stockmann, will settle for what is convenient, for 'majority truths' that are 'like last year's cured meat — like rancid, tainted ham; and they are the origin of the moral scurvy that is rampant in our communities'.¹ And the general public's right to take lies for the truth is supported by a 'doctrine':

that the public, the crowd, the masses, are the essential part of the population — that they constitute the People — that the common folk, the ignorant and incomplete element in the community, have the same right to pronounce judgment and to approve, to direct and to govern, as the isolated, intellectually superior personalities in it.²

The confrontation with the town earns Stockmann his epithet as an 'enemy of the people'.

This narrative has a more contemporary parallel, as well.

¹ Henrik Ibsen, *An Enemy of the People*, trans. R. Farquharson Sharp (Mineola, NY: Dover Publications, 1999), p. 60.

² Ibsen, *An Enemy of the People*, p. 60.

On 3 November 2016, the High Court of Justice of England and Wales ruled in *R (Miller) v Secretary of State for Exiting the European Union*³ that the notification to initiate the formal two-year process for the UK's withdrawal from the European Union, as prescribed in Article 50 of the Treaty on European Union (TEU), must be triggered by an act of Parliament, and not by the Prime Minister under the Crown's prerogative. The ruling, upheld by the Supreme Court the following year, was widely considered a victory for parliamentary sovereignty over cabinet executive powers.⁴

On the day after the High Court ruling, the *Daily Mail* published a full page cover with facial portraits of each of the three justices involved in the case in court dress and wigs, and the words 'Enemies of the People' were printed as the main heading below the portraits.⁵ The images and the heading suggested that these unelected judges represented a small privileged minority, and that their ruling undermined the democratic will that had been expressed by 'the People' in the Brexit referendum. The power of a social elite, described further down as 'out of touch', one judge identified as founding member of 'a club of lawyers and academics aiming to "improve" EU law', another as 'openly gay' and former Olympic fencer, is set against majority rule by 'the People'.

The juxtaposition is the same in both instances even if the narrative perspectives are diametrically opposite. The implied author of Ibsen's play, that is, the 'playwright', celebrates the 'aristocratic heroism' of the defiant middle-class individual with 'truth' on his side,⁶ whereas the 'journalist' ridiculing the High Court justices demands deference in the face of democratic majority rule by 'the People'.

Indeed, the democratic accountability of the judiciary to the elected branches representing 'the People' is usually portrayed through the restraint that the word 'deference' as a metaphor implies.⁷ In liberal democracies, the role of unelected justices is to apply — at most to interpret — laws that have been passed by

³ *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

⁴ E.g. Damian Chalmers, 'Gina Miller and the last Gasp of Parliamentary Sovereignty?', *Maastricht Journal of European and Comparative Law* 24: 1 (2017), pp. 3-5.

⁵ 'Enemies of the people: Fury over "out of touch" judges who have "declared war on democracy" by defying 17.4m Brexit voters and who could trigger constitutional crisis.' *Daily Mail*, 4 November 2016. <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>, accessed 4 December 2018.

⁶ On Ibsen's Nietzschean affiliations, see Ralph Leck, 'Enemy of the People: Simmel, Ibsen, and the Civic Legacy of Nietzschean Sociology', *The European Legacy* 10: 3 (2005), pp. 133-47.

⁷ On deference broadly, see e.g. Matthew Lewans, *Administrative Law and Judicial Deference* (Oxford: Hart Publishing, 2016).

democratically elected representatives of 'the People'. The aim of this chapter is to question the democratic plausibility of this admittedly simplified claim. In many European jurisdictions, domestic courts have, for instance, taken it upon themselves to actively monitor the ways in which state parties comply with their positive obligations in 'securing Convention rights' as per Article 1 of the European Convention on Human Rights (ECHR), a task that cannot, at least not without some reservation, be subsumed under the rubrics of mere 'application' and 'interpretation'.⁸ In this sense, the judiciary takes on 'activist' democratic functions that can be said to go beyond the traditional 'deference' paradigm.⁹

But in discussing these democratic functions, this chapter will not adopt the usual focus that views the judiciary as an institution or social agent with, perhaps, a particular political agenda.¹⁰ Instead, it will discuss the nature of the rights that the courts must adjudicate on, and how the adjudication of actionable rights by necessity positions the judiciary into a democratic landscape that goes beyond traditional accounts of 'deference' and disinterested application. This applies particularly to the basic and human rights that, over the last half century or so, have saturated practically all areas of judicial decision-making, especially in transnational contexts.¹¹ To make my argument, I will first clarify the position of human rights in Claude Lefort's unique blend of phenomenologically and psychoanalytically inspired political theory. Human rights, and if my analogy is plausible, by extension all actionable rights, are in this account an integral element of a 'savage democracy' that Lefort envisions as the only plausible political challenge to the totalitarian tendencies of neoliberalism. In dealing with such rights, the judiciary, so I suggest, takes on democratic functions that are not compatible with the much narrower notion of adjudication that the 'deference' paradigm implies.

From this starting point, I will then continue to discuss in more detail the position of the judiciary in contemporary democracies and with special reference to its role in a separation of powers doctrine. Standard accounts of the doctrine reduce the judicial powers of unelected courts to the application and interpretation of laws passed by an elected legislator. But as the relationship between the legislature and the executive branch has factually changed in contemporary democracies, so too has the

⁸ See e.g. Helen Keller and Alec Stone Sweet (eds.), *A Europe of Rights. The Impact of the ECHR on National Legal Systems* (Oxford: Oxford University Press, 2008).

⁹ E.g. Graham Gee, Robert Hazell, Kate Maleson, and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge: Cambridge University Press, 2015).

¹⁰ E.g. Kate Maleson, *The New Judiciary. The Effects of Expansion and Activism* (Aldershot: Dartmouth, 1999).

¹¹ E.g. Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

relative position of the judiciary. A strong executive as the engine of legislative initiatives, supported by the weak parliamentary scrutiny of a 'rubber-stamp' legislature, has highlighted the need for a more active judiciary, a more democratically self-reflexive 'People's' judiciary, that reaches beyond the 'deferential' role that standard accounts offer.

Lefort and the body politic

The main reason why Claude Lefort's name comes up so often in discussions about politics, ranging from Ernesto Laclau and Chantal Mouffe's critical theory of the hegemony of radical democracy,¹² to the post-Heideggerian analyses of Philippe Lacoue-Labarthe and Jean-Luc Nancy,¹³ is the distinction that he popularised between *le politique* as a form of political regime, usually translated into English as 'the political', and *la politique* or social agency conflict-ridden by opposing and often irreconcilable interests, usually translated simply as 'politics'.¹⁴ While many seem to think of the distinction was specifically introduced by Lefort, its origins in French political theory can be traced to Lucien Freund and Régis Debray¹⁵ through an emphatically philosophical reception of Max Weber.¹⁶

While 'politics' in the second apparently more conventional sense can be understood as the antagonist competition for power in all of its usual guises, Lefort's use of the term 'the political', in turn, refers to the way in which a given society represents its own unity to itself as a collectivity. It could, then, be understood as a form of collective identity, a representation of the body politic through which society identifies itself claiming to be, for example, a 'liberal democracy'. Commenting on Raymond Aron who is a major source of inspiration here,¹⁷ Lefort notes how the term

¹² Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy. Towards a Radical Democratic Politics*, 2nd ed. (London: Verso, 2001).

¹³ Philippe Lacoue-Labarthe and Jean-Luc Nancy, *Retreating the Political*, trans. Simon Sparks (London: Routledge, 1997).

¹⁴ See also Martin Plot (ed), *Claude Lefort: Thinker of the Political* (Basingstoke: Palgrave Macmillan, 2013), Oliver Marchart, *Post-Foundational Political Thought. Political Difference in Nancy, Lefort, Badiou and Laclau* (Edinburgh: Edinburgh University Press, 2007), and Martin Breugh, Christopher Holman, Rachel Magnusson, Paul Mazzocchi, and Devin Penner (eds.), *Thinking Radical Democracy. The Return to Politics in Post-War France* (Toronto: University of Toronto Press, 2015).

¹⁵ See Julien Freund, *L'Essence du politique* (Paris: Dalloz, 2003), and Régis Debray, *Critique of Political Reason*, trans. David Macey (London: Verso, 1983).

¹⁶ In particular Raymond Aron, *Main Currents in Sociological Thought. Volume 2: Durkheim, Pareto, Weber*, trans. Richard Howard and Helen Weaver (New Brunswick, NJ: Transaction Publishers, 1999), pp. 219-346, and Julien Freund, *The Sociology of Max Weber*, trans. Mary Ilford (London: Routledge, 1998).

¹⁷ Especially Raymond Aron, *Democracy and Totalitarianism*, trans. Valence Ionescu (London: Weidenfeld and Nicolson, 1968).

'the political' is used in at least two ways:

In a first meaning, this term designates a particular domain of the social ensemble; it delimits the source of authority, the conditions and means of its exercise, and the range of its competences. In a second meaning, the *political* refers to the social ensemble itself, for the entire collectivity is affected by conceptions of the nature of power and the mode of the exercise of government. ... decisions made at the top have repercussions in all domains of social life but also ... the representation of authority in the particular sector of politics circulates in some manner throughout the social ensemble. It is in this second sense that it becomes relevant to affirm a 'primacy of the political,' no matter the society under consideration.¹⁸

So in the first meaning, 'the political' refers to the institutional framework of a polity that we may call, for instance, 'liberal democracy'. This framework includes state 'branches' and authorities, their legally defined competences, the regulations covering political participation, as well as the 'softly normative' expectations that political conventions create. But in the second, more important meaning, 'the political' also includes the ways in which social agents, be they institutional or individual, self-reflexively act in relation to each other as constituent elements of a particular polity. An institutional 'liberal democratic' agent will, then, understand its relationship with other institutions and individuals through a certain rationale that usually aims at maintaining its relative position in the overall framework.

Drawing on both the phenomenology of his mentor Maurice Merleau-Ponty¹⁹ and the psychoanalytic theory of Piera Aulagnier²⁰, Lefort maintains that 'the political'

¹⁸ Claude Lefort, 'The Political and the Social', in Claude Lefort, *Complications. Communism and the Dilemmas of Democracy*, trans. Julian Bourg (New York, NY: Columbia University Press, 2007), pp. 113-23, at pp. 113-14. There is an echo here of the way in which Carl Schmitt makes a distinction between the constitution in its relative and absolute senses. See Carl Schmitt, *Constitutional Theory*, trans. Jeffrey Seitzer (Durham, NC: Duke University Press, 2008), pp. 59-74.

¹⁹ Especially the posthumous Maurice Merleau-Ponty, *The Visible and the Invisible. Followed by Working Notes*, trans. Alphonso Lingis (Evanston, IL: Northwestern University Press, 1968). See also Bernard Flynn, *The Philosophy of Claude Lefort. Interpreting the Political* (Evanston, IL: Northwestern University Press, 2005).

²⁰ See Piera Aulagnier, *The Violence of Interpretation. From Pictogram to Statement*, trans. Alan Sheridan (Hove: Brunner-Routledge, 2001). Aulagnier was originally trained by Jacques Lacan, but later co-founded the so-called 'Fourth Group' that split away from Lacan's EFP in 1969 over disagreements concerning training protocols. See e.g. Cornelius Castoriadis, 'Epilegomena to a Theory of the Soul Which Has Been Presented as Science', in Cornelius Castoriadis, *Crossroads in the Labyrinth*, trans. Kate Soper and Martin H. Ryle (Cambridge, MA: MIT Press, 1984), pp. 3-45. Aulagnier was at one point married to Castoriadis, Lefort's collaborator from the *Socialisme ou Barbarie* period, 1947-1958. See Cornelius Castoriadis et al,

not only shapes (*mise-en-forme*) collective life into more or less permanent social relations, but that it also stages (*mise-en-scène*) individual interpretations of those relations as politics. Only these relations and their individual interpretations can together provide form and meaning (*mise-en-sens*).²¹ In this sense, the dimensions of 'the political' and 'politics' are interwoven into one another. The antagonistic or conflictual element of political action, of 'politics', is always reflected in a given society's representation of itself, in 'the political', and vice versa. Neither dimension can exist independently of the other.

The two modern ideal-typical regimes of 'the political' that Lefort has looked at in more detail, namely totalitarianism and democracy, share a kinship, but operate in diametrically opposite ways. In both, 'the political' functions as a symbolic constitution in so far as it locates society's unity at a particular point of power. As regimes, both totalitarianism and democracy are responses to the same question in so far as they attempt to come to terms with the empty space that has been left behind after the monarchy with its claim to the transcendental nature of the monarch's divine power has lost its capacity to represent the corporeal unity of the body politic. Following the symbolic decapitation of the monarch and the consequent dissolution of the kingdom that she represented, power appears as an empty space. Democracy, Lefort emphasises, leaves that space empty. In the absence of monarchs, those who exercise power can henceforth only be mortals who occupy positions of power temporarily or who can invest themselves in it only by force or cunning. Such a fragile unity is unable to efface the underlying social division. For Lefort, this division represents the true nature of democracy as a political regime:

Democracy inaugurates the experience of an ungraspable, uncontrollable society in which the people will be said to be sovereign, of course, but whose identity will constantly be open to question, whose identity will remain latent.²²

In other words, the antagonistic and conflictual nature of 'politics' that keeps the symbolic space of power empty is what characterises 'the political' of the democratic regime. In democracy, 'politics' prevents 'the People' from becoming a fixed sovereign in the monarch's stead.

Totalitarianism, on the other hand, is an attempt to fill that space, to unify society by placing society itself into the emptiness left behind after the regicide and the

Socialisme ou barbarie. Anthologie (La Bussière: Acratie, 2007).

²¹ Claude Lefort, 'The Permanence of the Theologico-Political?', in Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity, 1988), pp. 213-55, at pp. 217-21.

²² Claude Lefort, 'The Image of the Body and Totalitarianism', in Claude Lefort, *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism*, trans. Alan Sheridan et al (Cambridge: Polity, 1986), pp. 292-306, at pp. 303-04.

consequent dissolution of the body politic. With violence and repression totalitarianism attempts to 'weld power and society back together again, to efface all signs of social division, to banish the indeterminateness that haunts the democratic experience',²³ or, in other words, to suppress the 'politics' that would maintain the emptiness of that space and prevent 'the People' from coagulating into a fixed sovereign.

Lefort's notion of democracy also has a legal dimension. For democracy:

goes beyond the limits traditionally assigned to the *état de droit*. It tests out rights which have not yet been incorporated in it, it is the theatre of a contestation, whose object cannot be reduced to the preservation of a tacitly established pact but which takes form in centres that power cannot entirely master.²⁴

Political rights beyond the rule of law

In other words, Lefort's interpretation allows us to see the judiciary as part of a stage on which contradictory and often irreconcilable interests are played out as actionable rights. So the claim does not follow the usual line of argument that begins with a politicised 'counter-majoritarian' judiciary that then goes on to adjudicate on rights in a political way,²⁵ but that rights themselves are by their very nature political, and that adjudicating on them necessarily positions the adjudicator — the judiciary — in a 'democratic' way.

Lefort's rather optimistic take on the democratic potential of rights may seem curious bearing in mind that his background is in critical political theory. This view has a very particular history. French representatives of the so-called 'post-Marxist' or 'radical democratic' movement would entertain a somewhat more positive view on the revolutionary potential of human rights than their Anglophone and German counterparts.²⁶ After decades of Marxist human rights critique, the discussion in

²³ Lefort, 'The Image of the Body and Totalitarianism', p. 305.

²⁴ Claude Lefort, 'Politics and Human Rights', in Claude Lefort, *The Political Forms of Modern Society. Bureaucracy, Democracy, Totalitarianism*, trans. Alan Sheridan et al (Cambridge: Polity, 1986), pp. 239-72, at p. 258.

²⁵ See e.g. Scott E. Lemieux and David J. Watkins, *Judicial Review and Contemporary Democratic Theory. Power, Domination, and the Courts* (New York, NY: Routledge, 2018), and Luís Roberto Barroso, 'Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts', in Thomas Bustamante and Bernardo Gonçalves Fernandes (eds.), *Democratizing Constitutional Law. Perspectives on Legal Theory and the Legitimacy of Constitutionalism* (New York, NY: Springer, 2016), pp. 71-90.

²⁶ Generally, see Justine Lacroix, 'A Democracy Without a People? The "Rights of Man" in French Contemporary Political Thought', *Political Studies* 61: 3 (2013), pp. 676-90, Stephen W. Sawyer and Iain Stewart (eds.), *In Search of the Liberal*

France took this decisive turn in 1980 specifically with Lefort's seminal article 'Politics and Human Rights'.²⁷ For Lefort, human rights — and, as I wish to suggest here, rights more generally — are a *politics* of rights equivalent to democratic politics. Lefort rejects the critique of the early Marx who famously declared that human rights 'are nothing but the rights of the *member of civil society*, that is, of egoistic man, of the man who is separated from other men and from the community'.²⁸ So Marx sees rights merely as a consequence of the decomposition of society into isolated monadic individuals. But for Lefort, even social separation is a modality of man's relation to others.

Views in this debate were far from uniform. A fitting counterpoint for Lefort would be his former student Marcel Gauchet who is, perhaps, better known for his historical analyses of democracy or the relationship between religion and politics.²⁹ Following the publication of Lefort's article, Gauchet published his own intervention with the provocative title 'Human rights are not a politics'.³⁰ Gauchet opens his essay with an almost scornful stab at the renewed interest in human rights in France, a stab

Moment. Democracy, Anti-Totalitarianism, and Intellectual Politics in France since 1950 (Basingstoke: Palgrave Macmillan, 2016), and Natalie Doyle, 'Democracy as Socio-Cultural Project of Individual and Collective Sovereignty: Claude Lefort, Marcel Gauchet and the French Debate on Modern Autonomy', *Thesis Eleven* 75: 1 (2003), pp. 69-95. In addition to Lefort, Marcel Gauchet and Miguel Abensour discussed below, a fourth protagonist in this French debate would be Pierre Rosanvallon. See Pierre Rosanvallon, *Democracy Past and Future*, trans. Samuel Moyn (New York, NY: Columbia University Press, 2006), Pierre Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust*, trans. Arthur Goldhammer (Cambridge: Cambridge University Press, 2008), and Pierre Rosanvallon, 'The Test of the Political: A Conversation with Claude Lefort', *Constellations* 19: 1 (2012), pp. 4-15. See also Wim Weymans, 'Freedom through Political Representation: Lefort, Gauchet and Rosanvallon on the Relationship between State and Society', *European Journal of Political Theory* 4: 3 (2005), pp. 263-82, and James R. Martin, 'Pierre Rosanvallon's *Democratic Legitimacy* and the Legacy of Antitotalitarianism in Recent French Thought', *Thesis Eleven* 114: 1 (2013), pp. 120-33.

²⁷ Lefort, 'Politics and Human Rights'.

²⁸ Karl Marx, 'On the Jewish Question', in Karl Marx, *Marx. Early political writings*, trans. Joseph O'Malley and Richard A. Davis (Cambridge: Cambridge University Press, 1994), pp. 28-56, at p. 44.

²⁹ Marcel Gauchet, *The Disenchantment of the World. A Political History of Religion*, trans. Oscar Burge (Princeton, NJ: Princeton University Press, 1997).

³⁰ Marcel Gauchet, 'Les droits de l'homme ne sont pas une politique', *Le Débat* 3 (1980), pp. 3-21. To my knowledge, the article has not been translated into English. Twenty years later Gauchet wrote a reassessment of the debate, but still just as critical of any positive or emancipatory potential of human rights. See Marcel Gauchet, 'Quand les droits de l'homme deviennent une politique', *Le Débat* 110 (2000), pp. 258-88, and Marcel Gauchet, *La Révolution des droits de l'homme* (Paris: Gallimard, 1989). See also Geneviève Souillac, *Human Rights in Crisis. The Sacred and the Secular in Contemporary French Thought* (Lanham, MD: Lexington Books, 2005), pp. 1-50.

that is clearly aimed at, among others, his former teacher and friend:

and so the old becomes new, what was once the very definition of something suspect resurfaces as something beyond all suspicion, and so our antiquated, waffly and hypocritical human rights regain grace, innocence and a sulphurous audacity in the eyes of the most subtle and exigent members of the avant-garde.³¹

This stab reflects the rift that developed between political theorists like Lefort who, despite being 'post-Marxist' in the aftermath of the hugely divisive '*choc Soljénitsyne*',³² still relied on Marx in his attempts at creating a social theory, and Gauchet who quickly became one of the key figures of the liberal left. As Samuel Moyn convincingly illustrates, Gauchet's disagreement is not so much about human rights per se, but about the notion of individualisation.³³ Apart from that, Gauchet, the historian, has no explicit 'theory of rights' on the basis of which he could disagree with Lefort. He seems far more concerned — and quite rightly so — about the factual ability of human rights to promote social justice and about the willingness of the courts to participate in this political work.

For Lefort, the situation is, however, quite different. He seems to be less interested in whether rights can successfully deliver on what they promise. His focus is more on the *potential* of an 'agonistic' understanding of rights and what that would imply for democracy as an ideal-typical regime. The 'state of right', an *état de droit*, as Lefort understands it, introduces a 'disincorporation' of both power and right rather than their complete separation from each other. And so the 'state of right' will always include within itself an 'opposition in terms of right':

The rights of man reduce right to a basis which, despite its name, is without shape, is given as interior to itself and, for this reason, eludes all power which would claim to take hold of it whether religious or mythical, monarchical or popular. Consequently, these rights go beyond any particular formulation which has been given of them; and this means that their formulation contains the demand for their reformulation, or that acquired rights are not necessarily called upon to support new rights.³⁴

³¹ Gauchet, 'Les droits de l'homme ne sont pas une politique', p. 3 (my translation).

³² See e.g. Michael Scott Christofferson, *French Intellectuals Against the Left. The Antitotalitarian Moment of the 1970's* (New York, NY: Berghahn Books, 2004), pp. 89-112.

³³ Samuel Moyn, 'The Politics of Individual Rights: Marcel Gauchet and Claude Lefort', in Raf Geenens and Helena Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge: Cambridge University Press, 2012), pp. 291-310.

³⁴ Lefort, 'The Image of the Body and Totalitarianism', p. 258. See also Claude Lefort, 'Human Rights and the Welfare State', in Claude Lefort, *Democracy and Political Theory*, trans. David Macey (Cambridge: Polity Press, 1988), pp. 21-44,

Democracy is, then, a regime in which rights are always external in relation to power. In such a 'savage democracy', the law as the institution of right is, as Miguel Abensour, another former student and colleague, explains, no longer thought of as an instrument of social conservation, but as a potentially revolutionary source of authority for a society that constitutes itself as the indeterminate entity it is and will always be. In this sense, a right is always in excess of what it may have established. And once constituted into institutional forms, a constituent force will always reemerge in order to either reaffirm existing rights or to create new ones:

A political stage opens according to which there is a struggle between the domestication of rights and its permanent destabilization-recreation via the integration of new rights, new demands that are henceforth considered as legitimate. According to Lefort, it is the existence of this incessantly reborn protest, this whirlwind of rights, that brings democracy beyond the traditional limits of the 'State of right' [*État de droit*, *Rechtsstaat*].³⁵

The term 'savage democracy' that Abensour accredits to Lefort is apparently a direct reference although the English editions available of Lefort's work seem to bear little or no evidence of it.³⁶ Abensour, however, emphasises that the 'savagery' implied in the term is neither a reference to Hobbes nor to the political anthropologist Pierre Clastres whose seminal work on the political structures of so-called primitive societies was a major influence for the young Lefort.³⁷ Instead,

Claude Lefort, 'International Law, Human Rights, and Politics', *Qui Parle* 22: 1 (2013), pp. 117-37, and Raf Geenens, 'Democracy, Human Rights and History: Reading Lefort', *European Journal of Political Theory* 7: 3 (2008), pp. 269-86.

³⁵ Miguel Abensour, "'Savage Democracy' and the 'Principle of Anarchy'", in Miguel Abensour, *Democracy Against the State. Marx and the Machiavellian Moment*, trans. Max Blechman and Martin Breugh (Cambridge: Polity, 2011), pp. 102-24, at p. 108 (translation modified). These French and German expressions are not entirely compatible with what we mean by the 'rule of law' in English. See e.g. The Principle of the Rule of Law. Resolution of the Parliamentary Assembly of the Council of Europe No. 1594 (2007).

³⁶ Justine Lacroix traces this expression to an article from 1979. See Justine Lacroix, 'The "Right to Have Rights" in French Political Philosophy: Conceptualising a Cosmopolitan Citizenship with Arendt', *Constellations* 22: 1 (2015), pp. 79-90, at pp. 89, fn. 47. Most commentators only refer to Abensour.

³⁷ See Pierre Clastres, *Society Against the State. Essays in Political Anthropology*, trans. Robert Hurley (New York, NY: Zone Books, 1989), and Pierre Clastres, *Archeology of Violence*, trans. Jeanine Herman (Los Angeles, CA: Semiotext(e), 2010). See also Samuel Moyn, 'Of Savagery and Civil Society: Pierre Clastres and the Transformation of French Political Thought', *Modern Intellectual History* 1: 1 (2004), pp. 55-80, and Samuel Moyn, 'Savage and Modern Liberty: Marcel Gauchet and the Origins of New French Thought', *European Journal of Political Theory* 4: 2 (2005), pp. 164-87.

Abensour claims that Lefort's democracy is 'the form of society that, through the play of division, leaves the field open for the question the social asks of itself ceaselessly, a question in perpetual want of resolution but that is here recognised as interminable'.³⁸ In which case rights play a dual role both as the question being asked and as something that enables the asking.

Although Abensour here seemingly professes allegiance to his old teacher and colleague, James Ingram distinguishes two features in Abensour's own project that one cannot easily detect in Lefort.³⁹ First, Abensour's notion of democracy is built on a notion of popular sovereignty that is foreign to Lefort. For Lefort, 'the People' cannot act as a unified collective subject in the way in which Abensour would have to assume because no society is able to master its own development in the way in which such a notion of 'the People' suggests. Indeed, it would go against the gist of Lefort's agonistic premises. This also applies to Abensour's interpretation of how rights function in democracy and would undermine the 'revolutionary instrumentalism' that Abensour assigns to them.

Second, for Abensour, the state and its institutions are always a totalitarian threat to democracy, while Lefort seems to suggest that the state can advance democratic interests, as well. Hence his positive outlook *vis-à-vis* human rights. And so if the democratic actors of rights in Abensour's scheme can only be representatives of 'the People' set against a necessarily totalitarian state, Lefort would be more interested in the staging of these rights-related struggles in, for example, state-run courtrooms where the identity of the democratic actors is more fluid.

An agonistic separation

So in Lefort's overall view, democracy is not merely the *absence* of an external authority once God has been pronounced dead. Such an absence would simply represent the post-theological vacuum from which both political regimes, both totalitarianism and democracy, follow as archetypal variations of modernity. If totalitarianism is the frenzied attempt to fill that empty space with unifying structures that would abolish the social divisions of politics, then democracy, by contrast, is measured by the ability of politics — as, for example, actionable rights — to keep that space empty. Democracy is, in other words, marked by the *resistance* or *opposition* against the totalitarian tendencies of modern capitalism. One name for that resistance is 'right'.

What would the implications of Lefort's notion of rights be for the decision-

³⁸ Abensour, "Savage Democracy" and the "Principle of Anarchy", p. 105.

³⁹ James D. Ingram, 'The Politics of Claude Lefort's Political: Between Liberalism and Radical Democracy', *Thesis Eleven* 87: 1 (2006), pp. 33-50, at p. 44.

makers that are tasked to put them into effect, that is, for the judiciary? What are the democratic parameters of a judiciary of 'the People'?

The standard account of the position of the judiciary in a democratic environment is, as has been indicated earlier, framed through the notion of 'deference'. Although this is a mere approximation of the complex issue at hand, the task of unelected courts is to *apply* laws, issued by a democratically elected legislator, to individual cases. Unelected courts do not have a mandate to legislate on behalf of 'the People'. In principle, the independent discretion of the courts is said to be limited to situations where discretionary powers have either explicitly been delegated by the legislature, or where interpretation is needed to resolve cases in which the law remains ambiguous. Other than that, the courts are expected to defer any decisions that may seem 'political' to the elected branches. This standard account of a 'passive' or 'deferential' judiciary — as opposed to an 'activist' one — is dependent on a very specific understanding of rights as a question of law and on the assumed ability of the courts to tell 'questions of law' apart from politics as per equally standard accounts of, for want of a better term, 'legal positivism.'

The standard account has, of course, been criticised from several different angles. Martin Loughlin, to take one prominent critic, claims that rights adjudication is intrinsically political because it requires judges to 'reach a determination on the relative importance of conflicting social, political and cultural interests in circumstances in which there is no objective — or even consensual — answer'.⁴⁰ In this critical version of the standard account, rights represent conflicting interests, and resolving disputes on conflicting interests will make rights adjudication necessarily political, as well. So the political nature of adjudication is dependent on the conflictual nature of the interests represented by the rights that the courts must adjudicate on.

The emphasis in Lefort's notion of rights is slightly different. What is at stake is not so much the conflicting nature of the interests that individual rights represent, although this may be relevant, too. More important is the inability to fix these interests — *any political interests* — into formal law. According to the standard account, political interests, regardless of whether they are conflictual or not, can be stabilised into relatively fixed representations that can then be identified and isolated into 'questions of law', that is, into clearly delimited issues that the courts have the privilege to adjudicate on. So, for example, as a right, the freedom of expression as articulated in Article 10 ECHR would constitute a relatively stable set of circumstances that could time and again be adjudicated on in a more or less uniform way. But in Lefort's meaning, the existence and scope of such rights can always be

⁴⁰ Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), p. 129.

contested with either new interpretations of the right in question or even new rights.

The freedom of expression, to stick with our example, is, of course, always open to new interpretations that may clarify what falls under the protection of the right and what doesn't. There is an abundance of Strasbourg case law on Article 10 ECHR and on the 'limits of acceptable criticism' where the scope of the right is being continuously redrawn even if the shifts may appear small.⁴¹ The Lefortian point here being that this is not so much a consequence of the 'penumbral' quality of human rights law more specifically, but the *contestability of all rights*.

Moreover, the freedom of expression can in similar situations be challenged by entirely new rights such as, for example, a right to be protected from incitement to ethnic, racial or religious hatred when the exercise of the freedom of expression compromises such protection.⁴² Strictly speaking no such 'right to protection from the abuse of a right', of course, exists in the ECHR framework unless one is directly affected as the protected 'victim' of such hatred. But it can be construed from, for example, Article 17 ECHR that prohibits the use of Convention rights — the freedom of expression, for instance — against the core values embedded in the Convention itself. For Lefort, the ways in which a new right is legally construed would be of secondary importance. What is central is whether, to what extent, and how the argument made in favour of such a right is *effective* in the individual political contestation that is being staged by the judiciary.

So for Lefort, the factual and individual actionability of rights trumps the fixed stability that their legal formalisation might suggest. Any right seemingly fixed into law can always be contested with either a new right or with a reinterpretation of an existing one. The contestable quality of all rights accounts for what Abensour called the 'whirlwind of rights' that makes it impossible for the judiciary to limit itself to the ideal of the rule of law that the courts are thought to embody. Rights understood in this way always point to a regime of 'savage democracy' that goes beyond the formal limits of the *état de droit*. And they also outline a democratic role for the judiciary that goes beyond standard accounts drawn from any separation of powers doctrine.

⁴¹ See e.g. Tarlach McGonagle in collaboration with Marie McGonagle and Ronan Ó Fathaigh, *Freedom of Expression and Defamation. A Study of the Case Law of the European Court of Human Rights*, ed. Onur Andreotti (Strasbourg: Council of Europe, 2016).

⁴² This touches upon Jeremy Waldron's 'hate speech as harm' argument even if Waldron also identifies the offended party as the 'minority groups' that are specifically targeted. Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, MA: Harvard University Press, 2012). Here the question is more about the limits of 'my' obligation to tolerate hate speech targeted at someone else.

A balance of terror in a savage democracy

This democratic role is not, I would finally argue, merely theory. The increased 'activism' of courts, both national and transnational, has been well documented.⁴³ In the latest wave of activism, the courts themselves have not been the main agents of the development. Two background phenomena can be identified.

First, as modern societies have brought ever new areas of human and social life under the regulation of legal norms, the scope of the judiciary's decision-making powers has correspondingly grown.⁴⁴ But even more importantly, the priority given to transnational instruments in national jurisdictions, especially instruments like the ECHR bearing relevance to basic and human rights and the corresponding Strasbourg jurisprudence, has transformed the face of judicial decision-making more or less completely.⁴⁵ We have come far from the hypothetical model of a 'syllogism' that the judicial profession has traditionally entertained as the ideal model of disinterested legal reasoning.

At the same time, the political framework within which the judiciary exercises its powers has changed. Since September 2001, the political balance that a traditional tripartite separation of powers is intended to establish has changed due to increases in the authority of the executive.⁴⁶ These changes are related to the more general phenomenon of 'emergency politics'.⁴⁷

If we understand the separation of powers⁴⁸ to include an interbranch limitation

⁴³ E.g. Louis Pereira Coutinho, Massimo La Torre, and Steven D. Smith, *Judicial Activism. An Interdisciplinary Approach to the American and European Experiences* (Dordrecht: Springer, 2015), and Mark Dawson, Bruno De Witte, and Elise Muir (eds.), *Judicial Activism at the European Court of Justice* (Cheltenham: Edward Elgar, 2013).

⁴⁴ E.g. Alec Stone Sweet, *Governing With Judges. Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).

⁴⁵ E.g. Miguel Maduro, Kaarlo Tuori, and Suvi Sankari (eds.), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge: Cambridge University Press, 2014).

⁴⁶ E.g. John E. Owens and Riccardo Pelizzo (eds.), *The 'War on Terror' and the Growth of Executive Power? A Comparative Analysis* (Abingdon: Routledge, 2010). On the 'unbalanced' European executive, see Deirdre Curtin, *Executive Power of the European Union. Law, Practices, and the Living Constitution* (Oxford: Oxford University Press, 2010).

⁴⁷ E.g. Bonnie Honig, *Emergency Politics. Paradox, Law, Democracy* (Princeton, NJ: Princeton University Press, 2009).

⁴⁸ There is an abundance of literature that problematizes this admittedly simplified version of separated powers that I'm using here. See e.g. Christoph Möllers, *The Three Branches. A Comparative Model of Separation of Powers* (Oxford: Oxford University Press, 2013).

of the use of powers in accordance with a 'checks and balances'⁴⁹ formulation, that is, as not merely a constitutional division of labour, but as an attempt to prevent the concentration of power into the hands of one government branch or another,⁵⁰ then it is important to keep in mind that the limiting effect of the separation goes beyond explicit interventions like, for example, instances in which the courts have struck down primary legislation in judicial or constitutional review. Most research into these interbranch relations will focus either on the norms of competence that define the constitutional powers available, or the case law that represents the singular occurrences in which those powers have been exercised. But there is a third perspective somewhere between the two mentioned. The intervention implied in the norms of competence includes a *potentiality* that creates stability through mutual deterrence as a 'balance of terror'. The factual ability of the judiciary to intervene in the activities of the legislature or the executive functions as a restraint even if the ability suggested by the norm of competence is seldom invoked.

In the contemporary political climate, the 'balance of terror' of a traditional separation of powers with its 'checks and balances' has morphed into executive-driven forms of government where the ability of the democratically elected legislature to scrutinise and 'deter' the executive has weakened. In the resulting situation, the *relative position* of the judiciary in the *trias politica* will have changed, too. Factual power positions in such separations are always relational in the sense that changes between two branches will always affect the third. Consequently, as the relationship between the executive and the legislature has changed, the judiciary will have to rethink its democratic role — or at least it has the opportunity to do so — and try to restore the balance that has been disturbed. Lefort's agonistic definition of rights in a 'savage democracy' provides one theoretical framework for such a rethinking.

⁴⁹ The formulation is often accredited to the 'Federalists,' but the expression is, in fact, from John Adams. John Adams, *A Defence of the Constitutions of Government of the United States of America* (New York, NY: Da Capo Press, 1971).

⁵⁰ For this 'classical' view, see e.g. Charles de Secondat baron de Montesquieu, *The Spirit of the Laws*, trans. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), p. 157.